

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

77-7007

United States Court of Appeals
FOR THE SECOND CIRCUIT

HARTFORD NATIONAL BANK &
TRUST COMPANY,

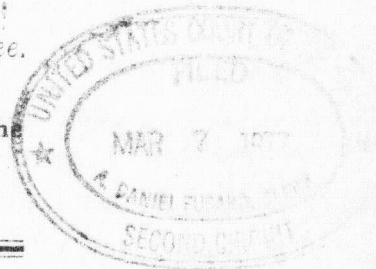
Plaintiff-Appellant,

against

WESTCHESTER FEDERAL SAVINGS & LOAN
ASSOCIATION,

Defendant-Appellee.

On Appeal from the United States District Court for the
Southern District of New York



DEFENDANT-APPELLEE'S BRIEF

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BRIEF FOR WESTCHESTER FEDERAL SAVINGS & LOAN ASSOCIATION,
DEFENDANT-APPELLEE

ISSUE PRESENTED FOR REVIEW

To whom does the money deposited by Hyde Park Company c/o Herbert Stoll, (hereinafter called HYDE PARK) in a Savings Account with the Defendant-Appellee, (hereinafter called WFS&LA) entitled "Fiduciary Account Hyde Park Company (Rent Security Account)" (Exhibit A; Appendix Page 88-a), belong?

STATEMENT OF THE CASE

This is an Appeal by the Plaintiff-Appellant, Hartford National Bank & Trust Company, (hereinafter called HARTFORD) from a Judgment of the District Court for the Southern District of New York (Appendix Page 77-a), awarding WFS&LA a Judgment dismissing HARTFORD's complaint.

HYDE PARK opened a "Fiduciary Account (Rent Security Account)" with WFS&LA on April 12, 1971. (Appendix Page 88-a). The Account, Number 450,964MO, was opened on or about April 12, 1971, in conjunction with and at or about the time that HYDE PARK closed a \$2,300,000.00 mortgage loan with WFS&LA, on the apartment house having a street address of 125 Strawberry Hill, Stamford, Connecticut, then owned by HYDE PARK.

The Passbook (Exhibit 4; Appendix Pages 83-a to 86-a) the Signature Card (Exhibit A; Appendix Page 88-a) and the Ledger Record Card (Exhibit B; Appendix Page 89-a), all show the originating date as April 12, 1971.

Though the Passbook is entitled "Hyde Park Company c/o Herbert Stoll" (Exhibit 4; Appendix Page 85-a), the bank records indicate that the Signature Card (Exhibit A; Appendix Page 88-a) is entitled "FIDUCIARY ACCOUNT HYDE PARK COMPANY (RENT SECURITY ACCOUNT)" signed by Herbert Stoll, and the Ledger Record Card (Exhibit B, Appendix Page 89-a) is entitled "RENT SECURITY ACCOUNT".

Except for the receipt of the Notice of Pledge (Exhibit 2;

Appendix Page 81-a) WFS&LA had no knowledge as to the transaction between Herbert Stoll, and HARTFORD. (Affidavit of Raymond W. Kerr, Page 25-a, Paragraph 3). Incidentally, Item D of the Notice of Pledge was received in blank, and not as shown in the Exhibit attached to HARTFORD'S "Joint Appendix".

Thereafter, upon WFS&LA'S refusal to release the moneys held in Account Number 450,964MO to the Plaintiff-Appellant, HARTFORD commenced this action for a release of said money.

WFS&LA maintained that since the account was a Fiduciary Account (Rent Security Account) it was not pledgable or assignable. (Answer to Complaint, Appendix Pages 10-a - 14-a)

As part of it's Answer, WFS&LA requested the Court render a Declaratory Judgment that the funds "are trust moneys which may not be pledge or encumbered and rightfully belong to the tenants who deposited them". (Appendix Page 12-a)

The Trial Court in it's decision, made no reference to the request for a Declaratory Judgment but did find that HARTFORD could not enforce it's claim to the rent security deposits. (Appendix Page 75-a)

In the course of this litigation, and before trial, HARTFORD made an application for summary judgment. (Appendix Pages 15-a - 23-a)

WFS&LA opposed the Motion for summary judgment on the grounds that there were triable issues which could only be resolved at trial.

The Opposing Affidavit (Appendix Pages 25-a - 29-a) of WFS&LA, stated that it made no claim of ownership to the monies on deposit and requested the Court adjudicate on the question as to who was entitled to said monies. WFS&LA also tendered the money to the Court or it's nominee (Appendix Page 28-a, Subdivision 13E) less costs, disbursements, and since WFS&LA was a Stakeholder, reasonable legal fee's. (Appendix Page 29-a Addendum Clause Paragraph 4)

The Trial Court denied HARTFORD'S Motion but did not act on WFS&LA'S request. (Appendix Page 24-a)

ARGUMENT

To whom does the money on deposit belong?

WFS&LA makes no claim to the money on deposit in Account Number 450,964MO, except for a claim for costs, disbursements, and legal fees, which were necessarily incurred as a result of the efforts of WFS&LA to release the funds only to those who were legally entitled to same.

HARTFORD makes claim to the funds on the grounds that the funds deposited became it's property after HYDE PARK defaulted in it's obligation to repay a \$35,000.00 loan.

After Trial, the Trial Court found "as a matter of fact and law, that the Hartford National Bank cannot enforce it's claim to these rent security deposits."

POINT I

THE SUBJECT MATTER OF THIS ACTION IS
LOCATED IN THE STATE OF NEW YORK, AND
NEW YORK LAW IS APPLICABLE IN DISPOSITION
OF SAME.

The rent security deposits under leases were deposited by tenants with HYDE PARK, the then owner of the building located in Stamford, Connecticut. HYDE PARK pursuant to agreement with WFS&LA, at the time of Mortgage Loan Closing, then deposited the Rent Security in the account, subject matter of this litigation entitled "Fiduciary Account Hyde Park Company (Rent Security Account)." The Signature Card, signed by Herbert Stoll constituted the contract between depositor and deposittee, and, therefore, subject to the Laws of the State of New York.

New York Law, Section 233 of RPL, (predecessor to Section 7-103 of the GOL) provides, among other things, that money deposited as rent security are Trust Monies.

In Mallory Associates v. Barving Realty Co., 90 NE 2nd 469, 300 NY 299, the New York Court of Appeals stated:

"Provision in Lease for deposit of
Security is a personal covenant be-
tween contracting parties, creates
"rights in personum", is not concerned

with creation or transfer of any interest in Realty, and will be determined by Law governing contract, even though subject matter of contract may be Realty in another State".

The Court of Appeals cited Real Property Law Section 233. (Preceded by Section 7-103 of GOL).

The Signature Card (Exhibit A; Appendix Page 88-a), the contract between HYDE PARK and WFS&LA was entitled, "Fiduciary Account Hyde Park Company (Rent Security Account)" signed by Herbert Stoll. By his having signed that Signature Card, he acknowledged that the account was a Trust Account.

Trust Funds may not be pledged as security for the repayment of a Trustee's personal loan. Any such pledge of Trust Funds is considered a misappropriation of funds.

In the matter of in re Pal - Playwell Inc. C.A.N.Y. 1964, 334 F 2nd 389 the Court said:

"A Trust established by this section (present GOL Section 7-103 formerly RPL Section 233) in a Lease, security deposit operates to protect the tenant

against misappropriation by the Landlord
of the funds deposited".

The basic New York Law that a rent security deposit creates a Fiduciary relationship was given further support in re Amphitheater, Inc. C.A.N.Y. 1968, 405 F 2nd 309 in which the Court affirmed that a security deposit becomes a Trust Fund unless otherwise provided in the Lease.

In the instant case, the Trial Court found, as a matter of fact, that the monies on deposit with WFS&LA were Fiduciary funds and as such could not be pledged to a third party, with actual knowledge that the Fiduciary has breached his obligations. (Without the third party participating in the breach and being liable to the beneficiaries.) The Court then cited re-statement of trusts, 2nd Section 288, Ketchum v. Packer, 65 Conn. 544, 33 a. 499 (1895).

POINT II

THE NATURE OF A SAVINGS ACCOUNT WILL
BE BINDING UPON ANY SUBSEQUENT HOLDERS
THEREOF IF THE HOLDER HAS KNOWLEDGE OF
THE NATURE OF SAID ACCOUNT.

In the case at bar, HARTFORD had actual knowledge of the nature of the Savings Account in question.

When WFS&LA by it's house counsel John Phelan, Esq., returned the

"Receipt of Notice of Pledge" he returned same with a memo:

"I am returning herewith, the Receipt
of the Notice of Pledge of the above
Savings Account, consisting of Security
Rents under Leases." (Emphasis Added)

The letter in itself was sufficient to constitute actual notice
to HARTFORD of the nature of the account pledged or to be pledged.

However, the Trial Court went further in it's decision and stated:

"Even if it were assumed that Plaintiff
did not have actual knowledge of the
Fiduciary character of the money, it
still cannot recover in an action against
Westchester Federal. Restatement of Trusts,
2nd Section 288 indicates that "if the
Trustee in Breach of Trust purports to
create in a third person an equitable
interest in the Trust Property, the
third person cannot enforce such equitable
interest if to do so would compel the
Trustee to complete the Breach of
Trust....." (Opinion and Order, Appendix;
Page 75a)

ARGUENDO

Assuming that the prudent man received a communication as was forwarded by John Phelan, Esq. to HARTFORD. Would the prudent man then without any further inquiry make the loan to HYDE PARK?

It is submitted that HARTFORD knew that the funds on deposit with WFS&LA was a rent security account, it was therefore incumbent upon HARTFORD to either make further inquiry or make the loan with knowledge that that which was being pledged as security was a Rent Security under Leases, account. It chose to make the loan without further inquiry thereby accepting the consequences on a measured and calculated risk.

WFS&LA raised the question as to whether the indispensable parties, namely HYDE PARK and the tenants who had deposited rent security under leases, should not have been made parties to this litigation.

If HARTFORD had made HYDE PARK and the tenants parties to this action, all issues collateral and otherwise could have been resolved. HARTFORD, for whatever reason, did not see fit to do so and the Trial Court rendered no opinion on the question.

POINT III

IT IS DISCRETIONARY WITH THE TRIAL COURT
AS TO WHETHER DOCUMENTS SUBMITTED IN
EVIDENCE WILL BE ADMITTED OR NOT.

This point is raised by WFS&LA to rebut HARTFORD's contention

that the documents submitted in evidence were not admissible on the grounds that a proper foundation had not been established before their introduction.

WFS&LA relies upon the cases cited by HARTFORD supporting the Law under Rule 803 of the Federal Rules of Evidence. The issue is not predicated upon the Law, which is clear and explicit, but rather involves the question of fact that concerns this review of the Trial Court's decision.

In United States v. Blake, 488 F 2nd 101 at Page 105, the Court stated:

"While the Trial Court does have wide discretion in determining the admissibility of documents....., there must be minimal authentication proof to give them reliability."

It is respectfully submitted that the Trial Court in its discretion was satisfied that the minimal authentication proof was given.

(Appendix Page 59-a, Line 18)

Q You are familiar with the records?

A Yes

Q And do you keep records in the regular course of business in your institution?

A We do

In fact, the Court questioned the witness before the Court admitted documents in evidence. (Appendix Page 63-a, 65-a) The Court thereafter admitted the Signature Card and the Ledger Card in evidence.

ARGUENDO

At trial WFS&LA complied with the prerequisites for admission of documents in evidence, pursuant to Rule 803 FRE. The Witness, Harold Hahn, testified that the records were kept in the regular course of WFS&LA's business, and secondly, that he was the then Custodian of the records. Mr. Hahn also testified that he was not the Custodian at the time that the Signature Card and the Ledger Card were completed and filed with WFS&LA.

A Custodian testifying as to the keeping of records and documents in the regular course of business need not be the Custodian who was responsible for the keeping of records when the original documents were prepared. If it were otherwise, the absence of the original Custodian by death or inability to be found to testify might preclude any records ever being introduced into evidence.

HARTFORD's Brief stated that if the records of WFS&LA were not admissible in evidence, HARTFORD's claim would prevail. WFS&LA cannot quarrel with this precept. However, the Trial Court admitted the documents in evidence and did not commit error in doing so.

CONCLUSION

At the time the account was opened, HYDE PARK by Herbert Stoll, signed the Signature Card entitled "Fiduciary Account Hyde Park Company (Rent Security Account)" simultaneously with the opening of the account

HYDE PARK made a deposit therein. The monies so deposited were therefore, Trust Monies. Subsequently, HARTFORD, with actual knowledge of the nature of the account, made a loan to HYDE PARK, and upon default in the repayment of said loan, HARTFORD attempted to withdraw the money from the Trust Account. WFS&LA refused to release the funds.

The Trial Court in it's decision found as a matter of fact and Law, that HARTFORD could not enforce it's claim to the rent security deposits. The Judgment against the Plaintiff-Appellant, dismissing the Plaintiff's complaint should be affirmed with costs, disbursements, and legal fees awarded.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUITHartford National Bank & Trust Co., Plaintiff-Appellant
against

Westchester Federal Savings & Loan Assn, Defendant-Appellee

State of New York, County of New York, ss.:

Bernard S. Greenberg, being duly sworn deposes and says that he is
agent for Pacor & Del Vecchio the attorney^s

for the above named Appellee herein. That he is over

21 years of age, is not a party to the action and resides at

162 East 7th Street, New York, N.Y.

That on the 7th day of March, 19 , he served the within

Defendant-Appellee's Brief

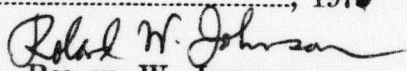
upon the attorneys for the parties and at the addresses as specified below

William M. Ivler,
300 Broad Street,
Stamford, Connecticut 06901

by depositing two true copies
to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
tained by the United States Government at
90 Church Street, New York, New York
directed to the said attorneys for the parties as listed above at the addresses aforementioned;
that being the addresses within the state designated by them for that purpose, or the places
where they then kept offices between which places there then was and now is a regular com-
munication by mail.

Sworn to before me, this 7th

day of March, 1970 7


ROLAND W. JOHNSON,Notary Public, State of New York
No. 4509705Qualified in Delaware County
Commission Expires March 30, 1977